SYKT. JENGKA SDN. BHD.

v.

TRI TRADE PROPERTIES (M) SDN. BHD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[CIVIL SUIT NO. C3449 OF 1984]
18 JANUARY 1988

CIVIL PROCEDURE: *Application to strike out statements of defence - Appeal against Senior Assistant Registrar's decision - Solicitor signing letter of undertaking - Whether it is binding - Undertaking given by solicitor personally or merely as an agent on behalf of his client - Whether there are triable issue of fact.*

The plaintiff's claim against the defendant is for the sum of RM346,500 being balance owned to the plaintiff in respect of goods sold and delivered to the 1st defendant. The 2nd defendant is alleged to have by a letter of undertaking undertook to pay the plaintiff all outstanding sums in the first defendant's account with the plaintiff up to a maximum of RM500,000 and upon the expiry of sixty days after the date of the delivery of the said goods. The second defendant denied that he was liable to pay the plaintiff the amounts claimed.

Held:

[1] the Letter of understanding was clearly written by the second defendant as an agent of the first defendant. The undertaking was not given by the solicitors personally. Furthermore the sum stated in the said letter had not been deposited with the second defendant.

[2] clearly there are issues to be tried in this case.

[Appeal dismissed with costs.]

Cases referred to:

Re Choe Kuan Him, Advocates & Solicitor; T. Damodaran v. Choe Kuan Him [1975] 2 MLJ 274
United Mining and Finance Corporation v. Bechen [1910] 2 KB 296
Seah Choon Chye v. Saraswathy Devi [1971] 1 MLJ 112

Other source referred to:

Halsbury's Laws of England, 3rd Edn., Vol. 36 at p. 195

For the plaintiff - Tan Chuan Yong; M/s. Mohd. Akhir & Partners
For the Thomas Lee - (one of the parties in the Second defendant's firm) - V.K. Palasuntharam.

JUDGMENT

Zakaria Yatim J:

This is an appeal against the decision of the Senior Assistant Registrar, Mr. Wong Teik Meng given on 15 August 1985 ordering that the application of the plaintiff dated 24 April 1985 for an order that both the statements of defence of the partners of the second defendant (sued as a firm) be struck off and judgment be entered against the second defendant be disallowed on the grounds that there are triable issued of fact in this matter.

The plaintiff is a private limited company incorporated in Malaysia with its registered office at No. 13A, Jalan Medan Tuanku, Kuala Lumpur. The first defendant is a private limited company incorporated in Malaysia with its registered office at No. 25, SS15/4B, Subang Jaya

Industrial Estate, Subang Jaya. The second defendant is a partnership firm of advocates and solicitors with their registered office at 2nd Floor, Wisma M.C. Choi, No. 31B - 282A, Medan Imbi, Kuala Lumpur.

The plaintiff's claim against the defendants is for a sum of RM346,500 being the amount outstanding as at 29 February 1984 and owed to the plaintiff in respect of goods sold and delivered to the first defendant at the first defendant's request *vide* first defendant account No. 4432 with the plaintiff. In its statement of claim the plaintiff averred that it was agreed and accepted by the defendant that interest at 1% per mensem would be charged on all outstanding monies in the said account. The plaintiff also averred that by a letter of undertaking dated 5 December 1983, the second defendant undertook to pay the plaintiff all outstanding sums in the first defendant's account with the plaintiff up to a maximum of RM500,000 and upon the expiry of sixty days after the date of the delivery of the said goods. The plaintiff's claim against the second defendant in on the said letter of undertaking. According to the plaintiff, the defendants had defaulted in payment and the amount due to the plaintiff was RM346,500.

In his statement of defence, Mr. Edmund Loo Siew Hoong, a partner in the second defendant firm, averred as follows: He admitted that at all materials times he was a partner of the second defendant firm, but he denied that he or his firm was liable to the plaintiff in respect of the plaintiff's claim. He stated that the amount outstanding as at 29 February 1984 and owed to the plaintiff in respect of goods sold and delivered to the first defendant was RM346,500, but he denied that he or the second defendant was liable to pay the plaintiff the said amount. Mr. Loo admitted that he had signed the second defendant's name in the letter dated 5 December 1983 but he said that he signed the said letter on behalf of the firm's clients, Tri-Trade Properties (M) Sdn. Bhd., that is the first defendant. Mr. Loo averred that the said letter did not create liability in the second defendant to pay the said sum to the plaintiff. He denied that the said letter was a guarantee, indemnity or undertaking in respect of the first defendant's alleged debt. He said that the second defendant was justified in not making payment to the plaintiff. According to him the first defendant had not placed any monies with the second defendant or given instructions to remit monies to the plaintiff.

The defence of Thomas Lee Guan Seong, another partner in the second defendant firm, is substantially the same as that of Edmund Loo. Mr. Thomas Lee also stated in his defence that the letter dated 5 December 1983 was not a letter of guarantee, indemnity or undertaking by the second defendant firm. Even if the said letter was a guarantee, indemnity or an undertaking, it did not bind the second defendant.

The basis of the plaintiff's claim against the second defendant is the letter dated 5 December 1983. The text of the letter is reproduced below:

> 5 December 1983.
>
> Encik Abdullah Azizi,
> The General Manager,
> Syarikat Jengka Sdn. Bhd.,
> 13A, Jalan Medan Tuanku,
> Jalan Tuanku Abdul Rahman,
> **Kuala Lumpur.**

Dear Sir,

Re: Letter of Undertaking favouring yourself (Tri-Trade Properties (M) Sdn. Bhd.).

We act for Tri-Trade Properties (M) Sdn. Bhd. who have instructed us to issue this Letter of Undertaking in connection with their purchase of certain quantities of plywood products which have been negotiated between our clients and yourselves. We hereby undertake to pay to yourselves a sum not exceeding RM500,000 (Ringgit Five Hindered Thousand only) on behalf of our clients in respect of the said purchase, such sum being due and payable upon the expiry of 60 (sixty) days after the date of delivery of the said goods.

Yours faithfully,

Sgd/-

c.c. Tri-Trade Properties (M) Sdn. Bhd.

According to the plaintiff, the above letter is a letter of undertaking and the plaintiff is entitled to enter judgment against the defendant on the undertaking.

It is to be noted that the letter quoted above expressly states that the second defendant was acting for the first defendant when they wrote the letter. The second defendant wrote the letter on the instruction of the first defendant. The letter does not state that the amount stated therein has been deposited with the second defendant. Indeed, in his statement of defence, Mr. Low averred that the first defendant had not placed any monies with the second defendant.

Counsel for the plaintiff relied on the case, *Re Choe Kuan Him, Advocate and solicitor; T. Damodaran v. Choe Kuan Him* [1975] 2 MLJ 274. But in that case the money was placed with the solicitor and it was expressly stated in the letter of undertaking. In *United Mining and Finance Corpn. v. Bechen* [1910] 2 KB 296, Hamilton J said,

> Whatever that expression may mean, I think it must at least go as far as this, that when a solicitor, in the course of business which he is conducting for clients with third parties incidental to those negotiation, that undertaking is one which is given in his capacity as a solicitor and not as mere layman undertaking the office of stakeholder or guaranteeing the payment of money. It seems to me that the part which solicitors are nowadays well known to pay in elaborate negotiations, which constantly have to be embodied at various stages in legal firms of a highly technical character, constantly involves for the purpose of facilitating the business the giving of subsidiary undertakings for the payment of money of a similar character, **and that those undertakings are given in their capacity as solicitors,** and money is entrusted to them under those undertakings largely because they are solicitors and are deemed therefore and found to be, especially worthy of trust.
> [Emphasis added].

In that case Hamilton J found upon the facts and upon the events which had happened the money in the respondent's hands was money repayable to the applicants by the terms of the undertaking.

In *Seah Choon Chye v. Saraswathy Devi* [1971] 1 MLJ 112, Syed Agil Barakbah J, as he then was, stated the principle regarding solicitor's undertaking in the following words,

> The general principles as regards an undertaking of this nature is that it must be given by a solicitor personally and not merely as an agent on behalf of his client. It must be given in his professional capacity as a solicitor and not as an individual.

Halsbury's Laws of England 3rd Edn., Vol. 36 at p. 195 states the principle in the following words:

> Where a solicitor, who acting professionally for a client, gives his personal undertaking in that character to ... a third ... person that undertaking may be enforced summarily upon application to the Court. Before this remedy can be pursued it must be shown that the undertaking is given by the solicitor personally, and not merely as agent on behalf of his client; the undertaking must also be given by the solicitor, not as an individual, but in his professional capacity as a solicitor.

In the instant case, the letter in question was clearly written by the second defendant as an agent of the first defendant. The undertaking was not given by the solicitor or solicitors personally. Furthermore the sum stated in the said letter had not been deposited with the second defendant.

Clearly there are issues to be tried in this case and I agree with the decision of the Senior Assistant Registrar. I therefore dismiss the appeal with costs in any event.

Also found at [1988] 2 CLJ 852